From the COURTS

WHEN CAN Bidders with bad track records BE REJECTED?

Renaissance Security and Cleaning Services CC v Rustenburg Local Municipality, Municipal Manager: Rustenburg Local Municipality and White Leopard Security Services CC in the High Court of South Africa, Bophuthatswana Provincial Division Case No 1811/07 (19 August 2008)

There are a number of legislative grounds upon which a municipal manager may reject a tender bid. One such ground is provided in the Municipal Supply Chain Management Regulations. Regulation 38(1) provides that a municipality's supply chain management policy must provide measures for combating abuse of the supply chain management system. Furthermore, it must enable the municipal manager to reject the bid of a bidder who, during the past five years, has failed to perform satisfactorily on a previous contract with the municipality or municipal entity or any other organ of state. This applies only if written notice has been given to that bidder that its performance was unsatisfactory. As with most other grounds for rejection, however, the Court in *Renaissance Security and Cleaning Services CC v Rustenburg Local Municipality* confirmed that the decision to reject a bid should not be taken lightly. This judgment is, moreover, the first to analyse Municipal Supply Chain Management Regulation 38(1)(d)(ii).

key points

- The municipality argued that the applicant's bad track record was a reasonable and justifiable ground to award the bid to the second highest bidder.
- The court held that the municipality could only reject the applicant's bid because of poor performance under a previous contract if it could prove that:
  - the applicant had a poor track record;
  - it was given *written* notification of its poor performance; and
  - it received or could reasonably be expected to have received such notification.
- The municipality failed to prove this and the court set aside the award of the bid to the second highest bidder.
- Disqualifications from bidding processes will be difficult without proof of written notification of poor performance under a previous contract.

Facts and arguments


Photo: Matt Lawson, www.travelblog.org

The Rustenburg Local Municipality invited bids for security services. More than 90 days later it informed participating bidders that the tender period had expired and asked them to confirm the validity of their bid prices. Renaissance Security and Cleaning Services CC submitted a bid and confirmed the validity of its prices, but was unsuccessful. Renaissance Security then approached the Court arguing, *inter alia*, that it was the highest-scoring bidder and that the tender should have been awarded to it and not the second-highest-scoring bidder, White Leopard Security Services CC.

The municipality argued that even though Renaissance Security had been the highest-scoring bidder, it had not been awarded the tender because of its bad track record in performing a previous contract with the municipality. It argued that Municipal Supply Chain Management Regulation 38(1)(d)(ii) was not the basis for rejecting the applicant's bid. Instead, the applicant's bid had been rejected because its bad track record amounted to a reasonable and justifiable ground not to award the tender to it. Reliance had, in other words, been placed on regulation 9 of the Preferential Procurement Regulations, which stipulates that "a contract may, on reasonable and justifiable grounds, be awarded to a tender that did not score the highest number of points". The municipality, moreover, argued that the applicant was aware of its unsatisfactory performance and that some letters had been written to it in this respect.

Judgment

In response to the municipality's argument that it had not rejected the bid on the basis of regulation 38(1)(d)(ii), the Court held that the municipality could not disregard legislation that governed its internal procedures and "instead latch on the Procurement Act". The Court looked at the wording of regulation 38(1)(d)(ii) and held that the provision was couched in peremptory terms. The sentence "after written notice was given to that bidder that performance was unsatisfactory" constitutes a safety valve at the disposal of contractors. A municipality must continuously monitor the service rendered by a contractor and has a duty to inform the contractor timeously, frequently and in writing of any unsatisfactory performance. This is to enable the contractor to improve on its performance. The clear spirit of regulation 38(1)(d)(ii), the Court held, was to "dispel the use of any secret weapon" against the contractor in future. A contractor can only improve if it is aware of its substandard performance.

The Court further held that the purpose of regulation 38(1)(d)(ii) had to be seen against the background of South Africa's history. Potential contractors with no or little business training background should not be "visited with a sledgehammer". Rather, they should be progressively nurtured and trained by municipalities to be professional business people of the future.

The Court held that the onus was on the municipality to prove at least that the applicant had a poor track record, that it had been given written notification of its poor performance and that it had received, or could reasonably be expected to have received, such notification. The municipality provided the Court with a letter written by Renaissance Security in which they arguably admitted to their poor performance under the contract. In the letter they referred to some of their workers sleeping on duty on a particular night.

The municipality argued that the letter had been written by Renaissance Security in response to a complaint by the municipality about their unsatisfactory performance. The Court held that what had prompted the writing of the letter was not as important as the fact that the applicant's workers had been asleep on duty. Nevertheless, the Court noted that an isolated incident such as this, in a contract that extended over at least 365 days, was not enough to constitute a bad track record. The Court further found that the municipality could not rely on a letter of complaint written to it by a member of the public to justify its rejection of the bid. The decision to reject the bid had been made before the letter was received by the municipality.

The Court concluded that the municipality had failed to discharge the onus on it. It had failed to provide the Court with proof that written notification had been given to the applicant regarding its poor performance. In that light, the municipality could not reject the bid on the basis of a bad track record and the Court set the rejection aside.

Comment

The Court held that Municipal Supply Chain Management Regulation 38(1)(d)(ii) placed an obligation on the municipality to inform the applicant in writing of its unsatisfactory performance in order to enable it to improve its performance. The municipality could not subsequently rely on the allegation of a bad track record to justify its rejection of the applicant's bid.

The Court's judgment was sound. It is, of course, not only to the benefit of a contractor that it should be informed of unsatisfactory contractual performance. The municipality receiving the goods or services will also benefit, because it is more likely to acquire an improved level and quality of service after notifying the contractor of its poor performance. Moreover, if the municipality in future wishes to disqualify that contractor from a bidding process on the grounds of its unsatisfactory performance under a previous contract, the written notice constitutes proof that the contractor was duly notified. Failure to provide such proof may, as illustrated in the *Renaissance Security* case, result in a court finding that the disqualification of the bidder was unfair. It is accordingly important for a municipality to give its contractors regular feedback and, in particular, to provide them with written notification of any unsatisfactory performance and to keep a record of such notifications.

It is interesting to note that the review proceedings in *Renaissance Security* were preceded by an urgent application for an interdict to prevent the municipality from implementing the awarding of the bid to the second-highest-scoring bidder (10 August 2007). The interdict was refused because the Court was not convinced that Renaissance Security would be successful in review proceedings. The Court found that there was proof that Renaissance Security had been notified of its unsatisfactory performance under the previous contract with the municipality. The municipality presented the Court with a number of examples of incidents that had resulted in the rejection of the applicant's bid. For example, the employees of Renaissance Security had on numerous occasions abandoned their posts, leaving municipal assets unguarded; one of the applicant's employees who guarded the residence of the Executive Mayor of the municipality had accidentally or negligently discharged his firearm whilst on duty, shooting himself in front of the Executive Mayor's children; and the employees of the applicant who worked at the traffic offices of the municipality were accused of soliciting or taking bribes on more than one occasion. It is clear, however, that in the review proceedings the municipality failed to provide the Court with sufficient proof that *written* notification had in fact been given to the applicant of these incidents as required by regulation 38(1)(d)(ii). It is on this basis that the Court set aside the awarding of the bid to the second-highest-scoring bidder.

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